

1 **CLAYEO C. ARNOLD**
2 **A Professional Law Corporation**
3 **Clayeo C. Arnold, SBN 65070**
4 **Clifford L. Carter, SBN 149621**
5 **Kirk J. Wolden, SBN 138902**
6 **608 University Avenue**
7 **Sacramento, CA 95825**
8 **Telephone (916) 924-3100**
9 **Fax: (916) 924-1829**

10 **Attorney for Plaintiffs**

11 **UNITED STATES DISTRICT COURT**
12 **EASTERN DISTRICT OF CALIFORNIA**

13 **MARTIN SMITH, JULIE SMITH,**

14 **Plaintiffs,**

15 **vs.**

16 **MERCK & CO., INC., and Does 1**
17 **through 25, inclusive,**

18 **Defendants.**

19 **Case No:**

20 **COMPLAINT FOR PERSONAL INJURIES**
21 **AND DEMAND FOR JURY TRIAL**

22 **COMPLAINT AND DEMAND FOR JURY TRIAL**

23 Plaintiffs, Martin Smith and Julie Smith, his wife, through their undersigned attorneys
24 CLAYEO C. ARNOLD, A Professional Law Corporation, and allege as follows:

25 **I. JURISDICTION AND VENUE**

26 1. This Court has jurisdiction pursuant to 28 U.S.C. §§1332, as complete diversity
27 exists between Plaintiff and Defendant. Plaintiff is a resident of the State of California, and
28 Defendant is incorporated and has as its primary business in the State of New Jersey. The
amount in controversy, exclusive of interest and costs, exceeds \$75,000.

2. Venue is proper within this district pursuant to Case Management Order No. 3, filed November 1, 2006, signed by John F. Keenan, allowing Fosamax- related cases to be filed directly in the Southern District of New York.

3. Plaintiff, Carmen Wilson, specifically demands a jury trial.

II. PARTIES

4. Plaintiff Martin Smith was born June 12, 1937. At all relevant times Plaintiff was a resident of Weimar, California, and used FOSAMAX from July, 2000 until January, 2007. Martin Smith was married to Julie Smith at all times material to this action.

5. Defendant is a corporation organized and existing under the laws of the State of New Jersey, with its principal place of business in New Jersey. The Defendant's registered office is at 820 Bear Tavern Road, City of West Trenton, Mercer County, New Jersey.

6. Defendant was at all relevant times authorized to conduct business in the State of California and the State of New York.

7. Defendant has regularly transacted business in the State of California and the State of New York and continues to do so.

8. At all relevant times Defendant, through its agents, servants, employees and apparent agents was the designer, manufacturer, marketer, distributor and seller of FOSAMAX, a bisphosphonate drug used primarily to mitigate or reverse the effects of osteoporosis.

9. Defendant, either directly or through its agents, apparent agents, servants or employees, at all relevant times, sold and distributed FOSAMAX in the State of California for the treatment of pain and inflammation.

10. Defendant derives substantial revenue from pharmaceutical products used or consumed in the State of California and in the State of New York.

11. Defendant expected, or should have expected, that its business activities could or would have consequences within the State of California and in the State of New York.

III. SUMMARY OF THE CASE

12. Defendant, either directly or through its agents, apparent agents, servants or employees designed, manufactured, marketed, advertised, distributed and sold FOSAMAX for the treatment of osteoporosis, Paget's Disease, and other off-label uses.

13. As a result of the defective nature of FOSAMAX, persons who were prescribed and ingested FOSAMAX, including Plaintiff Martin Smith, have suffered and may continue to suffer severe and permanent personal injuries to the jaw bone, including osteonecrosis of the jaw and other diagnoses of irreversible damage to the jaw.

14. Defendant concealed its knowledge of FOSAMAX's unreasonably dangerous risks from Plaintiff Martin Smith, other consumers, and the medical community.

15. Defendant failed to conduct adequate and sufficient post-marketing surveillance of FOSAMAX after it began marketing, advertising, distributing, and selling the drug.

16. As a result of Defendant's actions and inaction, Plaintiff Martin Smith was injured due to her ingestion of FOSAMAX, which has caused and will continue to cause Plaintiffs' various injuries and damages. Plaintiffs accordingly seek compensatory damages.

IV. FACTUAL BACKGROUND

17. At all relevant times Defendant was responsible for, or involved in, designing, manufacturing, marketing, advertising, distributing, and selling FOSAMAX.

18. In September 1995, the United States Food and Drug Administration ("FDA") approved Merck's compound alendronate, which is marketed by Merck as FOSAMAX, for various uses, including the treatment of osteoporosis and Paget's Disease.

19. FOSAMAX falls within a class of drugs known as bisphosphonates. Bisphosphonates are used for treating bone conditions such as osteoporosis and Paget's disease. Other drugs within this class such as Aredia and Zometa are also used as chemotherapy and as adjunct chemotherapy but are not indicated for use in non-cancerous conditions such as osteoporosis.

20. There are two classes of bisphosphonates: the N-containing (nitrogenous) and non-N-containing (non-nitrogenous) bisphosphonates. The nitrogenous bisphosphonates

1 include the following: pamidronate (Aredia); ibandronate (Bondronat); and alendronate
2 (FOSAMAX). The non-nitrogenous bisphosphonates include the following: etridonate
3 (Didronel); clodronate (Bonefos and Loron); and tiludronate (Skelid). Alendronate, like the
4 others, contains a nitrogen atom, whereas etridonate, clodronate, and tiludronate do not. The
5 PDR for FOSAMAX confirms that the molecule contains a nitrogen atom.

6 21. Throughout the 1990s and 2000s, medical articles and studies appeared
7 reporting the frequent and common occurrence of osteonecrosis of the jaw within the
8 nitrogenous bisphosphonates used for chemotherapy. As with its reported and acknowledged
9 side effects concerning irritation, erosion, and inflammation of the upper gastrointestinal tract,
10 Merck knew or should have know that FOSAMAX, as a nitrogenous bisphosphonate, shared a
11 similar adverse event profiles to the other drugs within this specific subclass of
12 bisphosphonates (i.e., those containing nitrogen).

13 22. Merck knew and or should have known that bisphosphonates, including
14 FOSAMAX, inhibit endothelial cell function. Similarly, Merck knew or should have known that
15 Bisphosponates also inhibit vascularization of the affected area and induce ischemic changes
16 specific to patients mandibles (lower jaws) and maxillae (upper jaws) and that these ischemic
17 changes appear to be cumulative in nature.

18 23. Merck also knew or should have known that these factors combine to create a
19 compromised vascular supply in the affected area. As a result, a minor injury or disease can
20 turning into a non-healing wound. That in turn can progress to widespread necrosis (bone
21 death) and osteomyelitis (inflammation of bone marrow).

22 24. Dentists are now being advised by state dental associations to refrain from using
23 any invasive procedure (such as drilling a cavity) for any patient on FOSAMAX.

24 25. Once the osteonecrosis begins and becomes symptomatic, it is very difficult to
25 treat and is not reversible.

26 26. Shortly after Defendant began selling FOSAMAX, reports of osteonecrosis of the
27 jaw and other dental complications among users began surfacing, indicating that FOSAMAX
28 shared the class effects of the other nitrogenous bisphosphonates. Despite this knowledge,

1 Defendant failed to implement further study risk of osteonecrosis of the jaw relative to
2 FOSAMAX. Rather than evaluating and verifying the safety of FOSAMAX with respect to
3 osteonecrosis of the jaw, Defendant proposed further uses of FOSAMAX, such as FOSAMAX-D,
4 and sought to extend the exclusivity period of FOSAMAX through 2018.

5 27. Osteonecrosis of the jaw is a serious medical event and can result in severe
6 disability and death.

7 28. Since FOSAMAX was released, the FDA has received a number of reports
8 osteonecrosis of the jaw among users of FOSAMAX.

9 29. On August 25, 2004, the United States Food & Drug Administration ("FDA")
10 posted its ODS Postmarketing Safety Review on bisphosphonates - - specifically pamidronate
11 (Aredia), zoledronic acid (Zometa), risedronate (Actonel), and alendronate (FOSAMAX). This
12 was an epidemiologic review of the FDA adverse events database conducted by the FDA's
13 Division of Drug Risk Evaluation.

14 30. As a result of the FDA Review, the FDA observed that the risk of osteonecrosis
15 of the jaw was not confined to bisphosphonates used for chemotherapy. The FDA's review
16 indicated that the osteonecrosis of the jaw was a class effect which specifically extended to
17 the oral bisphosphonate, FOSAMAX.

18 31. As a result, the FDA recommended and stated that the labeling for FOSAMAX
19 should be amended by Merck to specifically warn about the risk of osteonecrosis of the jaw.
20 Merck has refused to accede to the FDA's request and, to this day, still does not warn of the
21 risk of osteonecrosis of the jaw in its FOSAMAX labeling.

22 32. Rather than warn patients, and despite knowledge known by Defendant about
23 increased risk of osteonecrosis of the jaw on patients using FOSAMAX, Defendant continues to
24 defend FOSAMAX and minimize unfavorable findings.

25 33. FOSAMAX is one of Defendant's top selling drugs. Averaging more than \$3
26 billion a year in sales.

1 34. Consumers, including Plaintiff Martin Smith, who have used FOSAMAX for
2 treatment of osteoporosis, have several alternative safer products available to treat the
3 conditions.

4 35. Defendant knew of the significant risk of dental and oral complications caused by
5 ingestion of FOSAMAX, but Defendant did not adequately and sufficiently warn consumers,
6 including Plaintiff Martin Smith, or the medical community, of such risks.

7 36. As a direct result, Plaintiff Martin Smith was prescribed FOSAMAX and has been
8 permanently and severely injured, having suffered serious consequences from the ingestion of
9 FOSAMAX. Plaintiff Martin Smith requires and will in the future require ongoing medical care
10 and treatment.

11 37. Plaintiff Martin Smith has suffered from mental anguish from the knowledge that
12 Plaintiff will have life-long complications as a result of the injuries Plaintiff sustained from the
13 use of FOSAMAX.

14 38. Plaintiff Martin Smith was prescribed and began taking FOSAMAX in 2000.

15 39. Plaintiff used FOSAMAX as prescribed and in a foreseeable manner.

16 40. As a direct and proximate result of using FOSAMAX, Plaintiff suffered severe
17 personal injury to the jaw.

18 41. Plaintiff, as a direct and proximate result of using FOSAMAX, suffered severe
19 mental and physical pain and suffering and has sustained permanent injuries and emotional
20 distress.

21 42. Plaintiff used FOSAMAX which had been provided to her in a condition that was
22 substantially the same as the condition in which it was manufactured and sold.

23 43. Plaintiff would not have used FOSAMAX had Defendant properly disclosed the
24 risks associated with the drug. Alternatively, Plaintiff would have known the precursor events
25 of osteonecrosis of the jaw and would have been able to avoid the clinical manifestation of the
26 symptoms as they currently exist.

27 44. Defendant, through its affirmative misrepresentations and omissions, actively
28 concealed from Plaintiff and her physicians the true and significant risks associated with taking

1 FOSAMAX. The running of any applicable statute of limitations has been tolled by reason of
2 Defendant's fraudulent concealment.

3 45. As a result of Defendant's actions, Plaintiff and her prescribing physicians were
4 unaware, and could not have reasonably known or have learned through reasonable diligence,
5 that Plaintiff had been exposed to the risks identified in this complaint, and that those risks
6 were the direct and proximate result of Defendant's acts, omissions, and misrepresentations.

7 **COUNTS**

8 **COUNT I: NEGLIGENCE**

9 46. Plaintiffs re-allege the above as if fully set forth herein.

10 47. Defendant owed Plaintiff, Martin Smith, and other consumers, a duty to exercise
11 reasonable care when designing, manufacturing, marketing, advertising, distributing, and
12 selling FOSAMAX.

13 48. Defendant failed to exercise due care under the circumstances and therefore
14 breached this duty by:

15 a. failing to properly and thoroughly test FOSAMAX before releasing the drug to
16 market;

17 b. failing to properly and thoroughly analyze the data resulting from the pre-marketing
18 tests of FOSAMAX;

19 c. failing to conduct sufficient post-market testing and surveillance of FOSAMAX;

20 d. designing, manufacturing, marketing, advertising, distributing, and selling FOSAMAX
21 to consumers, including Plaintiff, without an adequate warning of the significant and
22 dangerous risks of FOSAMAX and without proper instructions to avoid the harm which could
23 foreseeably occur as a result of using the drug;

24 e. failing to exercise due care when advertising and promoting FOSAMAX; and

25 f. negligently continuing to manufacture, market, advertise, and distribute FOSAMAX
26 after Defendant knew or should have known of its adverse effects.

1 49. As a direct and proximate consequence of Defendant's actions, omissions, and
2 misrepresentations, Plaintiff Martin Smith sustained significant and permanent injury of the
3 jaw. In addition, Plaintiff required and will continue to require healthcare and services.
4 Plaintiff has incurred and will continue to incur medical and related expenses. Plaintiff also has
5 suffered and will continue to suffer diminished capacity for the enjoyment of life, a diminished
6 quality of life, increased risk of premature death, aggravation of preexisting conditions and
7 activation of latent conditions, and other losses and damages. Plaintiff's direct medical losses
8 and costs include care for hospitalization, physician care, monitoring, treatment, medications,
9 and supplies. Plaintiff has incurred and will continue to incur mental and physical pain and
10 suffering and loss of wages and wage-earning capacity.

11 50. Defendant's conduct as described above was committed with knowing,
12 conscious, wanton, willful, and deliberate disregard for the value of human life and
13 the rights and safety of consumers such as Plaintiff, thereby entitling Plaintiff to
14 punitive damages so as to punish Defendant and deter it from similar conduct in the
15 future.

16 51. Plaintiff Martin Smith' spouse, Julie Smith, sustained a loss of
17 consortium as a result of the injuries and damages sustained by his wife incident to
18 the use of FOSAMAX. His damages include, but are not limited to, a loss of society,
19 companionship, society, services, support, and care. His losses are permanent and
20 continuing in nature.

21
22
23 COUNT II: STRICT LIABILITY

24 52. Plaintiffs re-allege the above.

25 53. Defendant manufactured, sold, distributed, marketed, and/or supplied
26 FOSAMAX in a defective and unreasonably dangerous condition to consumers,
27 including Plaintiff Martin Smith.
28

1 54. Defendant designed, manufactured, sold, distributed, supplied,
2 marketed, and/or promoted FOSAMAX, which was expected to reach and did in fact
3 reach consumers, including Plaintiff, without substantial change in the condition in
4 which it was manufactured and sold by Defendant.

5 55. Plaintiff used FOSAMAX as prescribed and in a manner normally
6 intended, recommended, promoted, and marketed by Defendant.

7 56. FOSAMAX failed to perform safely when used by ordinary consumers,
8 including Plaintiff, including when it was used as intended and in a reasonably
9 foreseeable manner.

10 57. FOSAMAX was defective in its design and was unreasonably dangerous
11 in that its unforeseeable risks exceeded the benefits associated with its design or
12 formulation.

13 58. FOSAMAX was defective in design or formulation in that it posed a
14 greater likelihood of injury than other similar medications and was more dangerous
15 than an ordinary consumer could reasonably foresee or anticipate.

16 59. FOSAMAX was defective in its design and was unreasonably dangerous
17 in that it neither bore nor was packaged with nor accompanied by warnings
18 adequate to alert consumers, including Plaintiff, of the risks described herein,
19 including, but not limited to, the risk of osteonecrosis of the jaw.

20 60. Although Defendant knew or should have known of the defective
21 nature of FOSAMAX, it continued to design, manufacture, market, and sell FOSAMAX
22 so as to maximize sales and profits at the expense of the public health and safety.
23 By so acting, Defendant acted with conscious and deliberate disregard of the
24 foreseeable harm caused by FOSAMAX.

25 61. Plaintiff could not, through the exercise of reasonable care, have
26 discovered FOSAMAX's defects or perceived the dangers posed by the drug.

27 62. As a direct and proximate consequence of Defendant's conduct,
28 Plaintiff Martin Smith sustained significant and permanent injury of the jaw. In

1 addition, Plaintiff required and will continue to require healthcare. Plaintiff has
2 incurred and will continue to incur medical and related expenses. Plaintiff also has
3 suffered and will continue to suffer diminished capacity for the enjoyment of life, a
4 diminished quality of life, increased risk of premature death, aggravation of
5 preexisting conditions and activation of latent conditions, and other losses and
6 damages. Plaintiff's direct medical losses and costs include care for hospitalization,
7 physician care, monitoring, treatment, medications, and supplies. Plaintiff has
8 incurred and will continue to incur mental and physical pain and suffering and loss of
9 wages and wage-earning capacity.

10 63. Defendant's conduct as described above was committed with knowing,
11 conscious, wanton, willful, and deliberate disregard for the value of human life and
12 the rights and safety of consumers such as Plaintiff, thereby entitling Plaintiff to
13 punitive damages so as to punish Defendant and deter it from similar conduct in the
14 future.

15 64. Plaintiff Martin Smith' spouse, Julie Smith, sustained a loss of
16 consortium as a result of the injuries and damages sustained by his wife incident to
17 the use of FOSAMAX. His damages include, but are not limited to, a loss of society,
18 companionship, society, services, support, and care. His losses are permanent and
19 continuing in nature.

20 COUNT III: BREACH OF EXPRESS WARRANTY

21 65. Plaintiffs re-allege the above.

22 66. Defendant expressly represented to Plaintiff Martin Smith and other
23 consumers and the medical community that FOSAMAX was safe and fit for its
24 intended purposes, that it was of merchantable quality, that it did not produce any
25 dangerous side effects, and that it was adequately tested.

26 67. FOSAMAX does not conform to Defendant's express representations
27 because it is not safe, has numerous and serious side effects, and causes severe
28 and permanent injuries.

1 68. At all relevant times FOSAMAX did not perform as safely as an ordinary
2 consumer would expect, when used as intended or in a reasonably foreseeable
3 manner.

4 69. Plaintiff Martin Smith, other consumers, and the medical community
5 relied upon Defendant's express warranties.

6 70. As a direct and proximate result of Defendant's actions, Plaintiff Martin
7 Smith sustained serious significant and permanent injury of the jaw. In addition,
8 Plaintiff required and will continue to require healthcare and services. Plaintiff has
9 incurred and will continue to incur medical and related expenses. Plaintiff also has
10 suffered and will continue to suffer diminished capacity for the enjoyment of life, a
11 diminished quality of life, increased risk of premature death, aggravation of
12 preexisting conditions and activation of latent conditions, and other losses and
13 damages. Plaintiff's direct medical losses and costs include care for hospitalization,
14 physician care, monitoring, treatment, medications, and supplies. Plaintiff has
15 incurred and will continue to incur mental and physical pain and suffering and loss of
16 wages and wage-earning capacity.

17 71. Defendant's conduct as described above was committed with knowing,
18 conscious, wanton, willful, and deliberate disregard for the value of human life and
19 the rights and safety of consumers such as Plaintiff, thereby entitling Plaintiff to
20 punitive damages so as to punish Defendant and deter it from similar conduct in the
21 future.

22 72. Plaintiff Martin Smith's spouse, Julie Smith, sustained a loss of
23 consortium as a result of the injuries and damages sustained by his wife incident to
24 the use of FOSAMAX. His damages include, but are not limited to, a loss of society,
25 companionship, society, services, support, and care. His losses are permanent and
26 continuing in nature

27 COUNT IV: BREACH OF IMPLIED WARRANTY

28 73. Plaintiffs re-allege the above paragraphs.

1 74. Defendant manufactured, distributed, advertised, promoted, and sold
2 FOSAMAX.

3 75. At all relevant times, Defendant knew of the use for which FOSAMAX
4 was intended and impliedly warranted the product to be of merchantable quality and
5 safe and fit for such use.

6 76. Defendant was aware that consumers, including Plaintiff Martin Smith,
7 would use FOSAMAX for treatment of osteoporosis and for other purposes.

8 77. Plaintiff and the medical community reasonably relied upon the
9 judgment and sensibility of Merck to sell FOSAMAX only if it was indeed of
10 merchantable quality and safe and fit for its intended use.

11 78. Defendant breached its implied warranty to consumers, including
12 Plaintiff; FOSAMAX was not of merchantable quality or safe and fit for its intended
13 use.

14 79. Consumers, including Plaintiff, and the medical community, reasonably
15 relied upon Defendant's implied warranty for FOSAMAX.

16 80. FOSAMAX reached consumers without substantial change in the
17 condition in which it was manufactured and sold by Defendant.

18 81. As a direct and proximate result of Defendant's action, Plaintiff Martin
19 Smith sustained significant and permanent injury of the jaw. In addition, Plaintiff
20 required and will continue to require healthcare and services. Plaintiff has incurred
21 and will continue to incur medical and related expenses. Plaintiff also has suffered
22 and will continue to suffer diminished capacity for the enjoyment of life, a
23 diminished quality of life, increased risk of premature death, aggravation of
24 preexisting conditions and activation of latent conditions, and other losses and
25 damages. Plaintiff's direct medical losses and costs include care for hospitalization,
26 physician care, monitoring, treatment, medications, and supplies. Plaintiff has
27 incurred and will continue to incur mental and physical pain and suffering and loss of
28 wages and wage-earning capacity.

1 82. Defendant's conduct as described above was committed with knowing,
2 conscious, wanton, willful, and deliberate disregard for the value of human life and
3 the rights and safety of consumers such as Plaintiff, thereby entitling Plaintiff to
4 punitive damages so as to punish Defendant and deter it from similar conduct in the
5 future.

6 83. Plaintiff Martin Smith' spouse, Julie Smith, sustained a loss of
7 consortium as a result of the injuries and damages sustained by his wife incident to
8 the use of FOSAMAX. His damages include, but are not limited to, a loss of society,
9 companionship, society, services, support, and care. His losses are permanent and
10 continuing in nature

11 COUNT V: FRAUDULENT MISREPRESENTATION

12 84. Plaintiffs re-allege the above paragraphs.

13 85. Defendant made fraudulent misrepresentations with respect to
14 FOSAMAX in the following particulars:

15 a. Defendant represented through its labeling, advertising, marketing
16 materials, detail persons, seminar presentations, publications, notice letters, and
17 regulatory submissions that FOSAMAX had been tested and found to be safe and
18 effective for the treatment of pain and inflammation; and

19 b. Defendant represented that FOSAMAX was safer than other alternative
20 medications.

21 86. Defendant knew that its representations were false, yet it willfully,
22 wantonly, and recklessly disregarded its obligation to provide truthful
23 representations regarding the safety and risk of FOSAMAX to consumers, including
24 Plaintiff, and the medical community.

25 87. The representations were made by Defendant with the intent that
26 doctors and patients, including Plaintiff, rely upon them.

1 88. Defendant's representations were made with the intent of defrauding
2 and deceiving Plaintiff, other consumers, and the medical community to induce and
3 encourage the sale of FOSAMAX.

4 89. Plaintiff Martin Smith, Plaintiff's doctors, and others relied upon the
5 representations.

6 90. Defendant's fraudulent representations evinced its callous, reckless,
7 willful, and depraved indifference to the health, safety, and welfare of consumers,
8 including Plaintiff.

9 91. As a direct and proximate result, Plaintiff Martin Smith sustained
10 significant and permanent injury of the jaw. In addition, Plaintiff required and will
11 continue to require healthcare and services. Plaintiff has incurred and will continue
12 to incur medical and related expenses. Plaintiff also has suffered and will continue
13 to suffer diminished capacity for the enjoyment of life, a diminished quality of life,
14 increased risk of premature death, aggravation of preexisting conditions and
15 activation of latent conditions, and other losses and damages. Plaintiff's direct
16 medical losses and costs include care for hospitalization, physician care, monitoring,
17 treatment, medications, and supplies. Plaintiff has incurred and will continue to
18 incur mental and physical pain and suffering and loss of wages and wage-earning
19 capacity.

20 92. Defendant's conduct as described above was committed with knowing,
21 conscious, wanton, willful, and deliberate disregard for the value of human life and
22 the rights and safety of consumers such as Plaintiff, thereby entitling Plaintiff to
23 punitive damages so as to punish Defendant and deter it from similar conduct in the
24 future.

25 93. Plaintiff Martin Smith' spouse, Julie Smith, sustained a loss of
26 consortium as a result of the injuries and damages sustained by his wife incident to
27 the use of FOSAMAX. His damages include, but are not limited to, a loss of society,
28

1 companionship, society, services, support, and care. His losses are permanent and
2 continuing in nature

3 COUNT VI: FRAUDULENT CONCEALMENT

4 94. Plaintiffs re-allege the above paragraphs.

5 95. Defendant fraudulently concealed information with respect to
6 FOSAMAX in the following particulars:

7 a. Defendant represented through its labeling, advertising, marketing
8 materials, detail persons, seminar presentations, publications, notice letters, and
9 regulatory submissions that FOSAMAX was safe and fraudulently withheld and
10 concealed information about the substantial risks of using FOSAMAX; and

11 b. Defendant represented that FOSAMAX was safer than other alternative
12 medications and fraudulently concealed information which demonstrated that
13 FOSAMAX was not safer than alternatives available on the market.

14 96. Defendant had sole access to material facts concerning the dangers
15 and unreasonable risks of FOSAMAX.

16 97. The concealment of information by Defendant about the risks of
17 FOSAMAX was intentional, and the representations made by Defendant were known
18 by Defendant to be false.

19 98. The concealment of information and the misrepresentations about
20 FOSAMAX were made by Defendant with the intent that doctors and patients,
21 including Plaintiff, rely upon them.

22 99. Plaintiff Martin Smith, Plaintiff's doctors, and others relied upon the
23 representations and were unaware of the substantial dental and oral risks of
24 FOSAMAX which Defendant concealed from Plaintiff's doctors and Plaintiff.

25 100. As a direct and proximate result of Defendant's fraudulent concealment
26 and misrepresentation, Plaintiff Martin Smith suffered significant and permanent
27 injury of the jaw and was caused to suffer severe and permanent injuries, including
28 pain and mental and physical anguish and suffering, including a diminished capacity

1 for the enjoyment of life, aggravation of preexisting conditions and activation of
2 latent conditions, and a fear of developing other harmful conditions or problems as a
3 result of the injury. Plaintiff has suffered and will continue to suffer a loss of wages
4 and wage-earning capacity and has incurred expense for medical care and treatment
5 due to the injuries caused by FOSAMAX.

6 101. Defendant's conduct as described above was committed with knowing,
7 conscious, wanton, willful, and deliberate disregard for the value of human life and
8 the rights and safety of consumers such as Plaintiff, thereby entitling Plaintiff to
9 punitive damages so as to punish Defendant and deter it from similar conduct in the
10 future.

11 102. Plaintiff Martin Smith' spouse, Julie Smith, sustained a loss of
12 consortium as a result of the injuries and damages sustained by his wife incident to
13 the use of FOSAMAX. His damages include, but are not limited to, a loss of society,
14 companionship, society, services, support, and care. His losses are permanent and
15 continuing in nature

16 GLOBAL PRAYER FOR RELIEF

17 WHEREFORE, Plaintiffs demand judgment against Defendant, as follows:

- 18 a. compensatory damages on each cause of action;
19 b. punitive damages on each cause of action;
20 c. reasonable attorneys' fees where recoverable;
21 d. costs of this action; and
22 e. such other additional and further relief as the Court may deem
23 necessary, appropriate, and just.
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VIII. DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury on all counts and issues so triable.

Date: August 7, 2007

Respectfully submitted

/s/ - CLIFFORD L. CARTER
CLIFFORD L. CARTER
Attorney for Plaintiff